NO. 48518-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANDREW MORTENSEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Daniel L. Stahnke, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Andrew Jens Peter Mortensen's two second degree assault convictions result in a double jeopardy violation.

2a. The trial court erred by refusing to reinstruct the jury with a self defense instruction that correctly stated it was lawful to use reasonable force to aid another who was about to be injured.

2b. Alternatively, defense counsel rendered constitutionally ineffective assistance of counsel for failing to timely propose a correct self defense instruction that included the defense-of-another language.

3a. The trial court erred in excluding the testimony of a defense witness who corroborated Mortensen's testimony under the pretrial ER 615 witness exclusion ruling.

3b. Defense counsel rendered ineffective assistance of counsel for failing to exclude a necessary defense witness from the courtroom.

4. Washington's pattern instruction on reasonable doubt is constitutionally defective.

5. The trial court erred in imposing a $200 criminal filing fee pursuant to RCW 36.18.020(2)(h) without considering Mortensen's ability to pay this legal financial obligation (LFO).

6. The trial court erred by indicating in the judgment and sentence that Mortensen pleaded guilty.

Issues Pertaining to Assignments of Error

1. The State obtained two second degree assault convictions for Mortensen's assaultive acts against Scott Burkett. However, these acts took place over a short period of time, in the same location, evinced the same intent or motivation, were uninterrupted by intervening acts or events, and afforded Mortensen no opportunity to reconsider his actions. Because the assaultive acts show a single course of conduct, do the two assault convictions violate the prohibition against double jeopardy?

2a. Did the trial court err in refusing to give a proposed defense instruction that correctly stated that Mortensen's reasonable use of force was legally justified if used to lawfully aid a person whom he reasonably believed was about to be injured?

2b. Did defense counsel, in failing to correctly propose the defense-of-another instruction until after the trial court instructed the jury but before oral argument, render ineffective assistance of counsel?

3a. The trial court refused to permit a witness who corroborated Mortensen's version of events to be recalled based on an ER 615 witness exclusion order. Did the trial court err in denying Mortensen's constitutional right to present a witness in his defense based on an evidence rule?

3b. Did defense counsel render ineffective assistance by not ensuring the witness referenced in issue statement 3a remained outside the courtroom?

4. Does the reasonable doubt instruction, stating a "reasonable doubt is one for which a reason exists," misdescribe the burden of proof, undermine the presumption of innocence, and shift the burden to Mortensen to provide a reason for why reasonable doubt exists?

5. Is the $200 criminal filing fee a discretionary LFO that requires consideration of financial circumstances and ability to pay before imposition?

6. Mortensen did not plead guilty but was convicted by a jury verdict. Should the judgment and sentence be amended to reflect this?

B. STATEMENT OF THE CASE

1. Charges and amended charges

The State initially charged Mortensen with three counts of second degree assault and three counts of felony harassment. CP 3-4. Two of the assault counts alleged Scott Burkett was assaulted: Count 1 alleged Mortensen recklessly inflicted substantial bodily harm under RCW 9A.36.021(1)(a) and Count 2 alleged Mortensen assaulted Burkett with a deadly weapon under RCW 9A.36.021(1)(c). CP 3. Count 2 also included a firearm enhancement. CP 3. The third assault charge alleged Mortensen

assaulted Joshua McDonald with a deadly weapon. CP 3. As for the felony harassment charges, the State alleged Mortensen threatened to kill Burkett, McDonald, and Bianca Lujan. CP 4.

Prior to trial, the State amended the information to include a seventh count for witness tampering. CP 10-12.

Because the State failed to present sufficient evidence that Mortensen threatened to kill Lujan, the trial court dismissed the felony harassment count as to her. RP 787-88. Following this dismissal, the State filed a second amended information that eliminated the felony harassment charge against Lujan and renumbered the counts. CP 132-34; RP 1396-97.

2. Trial evidence

The charges arose from a July 6, 2014 altercation between Mortensen and Lujan, Burkett, and McDonald.

Mortensen, along with Michael Nottingham, Aisha Nottingham, Jordan Nottingham, Patricia Huddleston, among others, were camping during the long holiday weekend on the bank of a flushing channel along the Columbia River. RP 819-20, 825-27, 919-20, 923-25, 997, 1027-29, 1091-95. Mortensen's group was playing hip hop or rap music at a loud volume. RP 129-30, 169-70, 220, 287, 304, 322, 832, 933, 1110.

Across the channel, Burkett, McDonald, and Lujan were gathered around a campfire. Burkett and McDonald shouted "turn down your music"

across the channel to Mortensen's group, and might have shouted something to the effect of "turn off the nigger shit." RP 198-99, 833-34, 933, 1112. People on both sides of the river then proceeded to yell insults at each other. RP 130-31, 172-73, 222-23, 282-89, 323-24, 935-36, 1113-16.

According to some witnesses, Mortensen and Michael Nottingham got into Mortensen's boat and rapidly drove across the channel. RP 132, 176, 224, 291-93, 324-25. According to Lujan, Burkett, and McDonald, Mortensen and Nottingham jumped off the boat and charged at Burkett and McDonald, respectively. RP 132, 154, 228-30, 177-78. Burkett stated Mortensen attacked him, but Burkett managed to place Mortensen in a chokehold. RP 179. Burkett indicated Mortensen began to lose consciousness, suddenly produced a gun, pointed it at Burkett, and then pistol whipped Burkett in the nose and on the back of the head. RP 181-83, 200. Burkett, McDonald, and Lujan also testified that Mortensen pointed the gun at Burkett and McDonald and asked them if they wanted to die tonight. RP 132-34, 154-56, 184-86, 231-33, 237. Although McDonald and Burkett testified Mortensen similarly threatened Lujan, Lujan testified that Mortensen did not. RP 155-56, 186, 236.

Mortensen and Nottingham gave a different version of events. Nottingham testified his car was parked on the other side of the channel and that Mortensen was merely dropping him off so he could retrieve his car and

pick his daughter up. RP 836, 856-57. Immediately upon going ashore after crossing the channel, a fishing pole hit Nottingham in the face, producing a gash above his eyebrow. RP 628, 847-48. Mortensen stated he saw Nottingham being dragged up the beach by a very large man, McDonald, whom Mortensen referred to as a "Sasquatch." RP 1126-27. Mortensen jumped off the boat and attempted to come to Nottingham's aid, but became involved in a physical altercation with Burkett. RP 1126-28. Mortensen hit Burkett in the shoulder, but Burkett managed to put his arms around Mortensen's neck from behind as Mortensen trying to make his way to Nottingham. RP 1128-30. Burkett placed Mortensen in a chokehold and Mortensen began to lose consciousness. RP 1131-32. Mortensen had dropped his handgun in the sand, and he and Burkett struggled to get the gun. RP 1131-32. Mortensen was able to grab the gun and hit Burkett in the face. RP 1134. He then again attempted to come to Nottingham's aid. RP 851, 854-55, 1137-38. Because Mortensen had a gun, Burkett or Mortensen told McDonald to let Nottingham go. RP 851, 1137.

Mortensen and Nottingham then got back onto the boat and went back to the other side of the channel. RP 1145. At some point, Lujan screamed that she was phoning police. RP 940, 1145. The whole exchange lasted a matter of minutes. RP 213, 294, 628, 851, 940.

Mortensen and his group concocted a story to tell police when they arrived. RP 861-62, 865, 891, 948-49, 968, 1153-54. They would say Lujan, McDonald, and Burkett used a raft to come over to Mortensen's campsite and instigate a fight. RP 893-94, 971, 1153-54. Mortensen did not initially plan on going along with the story, immediately telling police he had a gun and directing them to where he thought the gun was. RP 1156-57. However, according to Mortensen, officers threatened to take him to jail and call child protective services if they discovered Mortensen had crossed the river channel. RP 1156-57. Given the threats, Mortensen felt compelled to stick with the concocted story. RP 1158. Mortensen and Nottingham were arrested and taken to jail. RP 894-95, 1157-58.

3. Exclusion of corroborative testimony based on ER 615

Mortensen presented the testimony of Aisha Nottingham in his defense and wished to specifically elicit evidence that she heard responding police officers threaten to take Mortensen to jail and call child protective services if they discovered Mortensen had crossed the river channel. RP 950-55. The trial court denied this testimony, reasoning it was hearsay and the State would not have an opportunity to rebut the testimony because Aisha Nottingham could not identify the specific officers who made the threats. RP 951-53.

When it came time for Mortensen to testify, however, the trial court reversed its previous hearsay ruling, given that the testimony was not offered to prove the truth of the threats but for the threats' effect on Mortensen's state of mind. RP 1064-68, 1077-78. Mortensen thus testified about the threats. RP 1157-58,

Defense counsel wished to recall Aisha Nottingham to corroborate Mortensen's testimony. RP 1239-42. Because Aisha Mortensen had been in the courtroom following her testimony, however, the trial court would not permit the defense to recall her. RP 1241-42. The trial court noted it had specifically asked defense counsel whether Aisha Nottingham's presence in the courtroom would be an issue and that defense counsel indicated he did not plan on recalling her. RP 1080-81, 1241-42. Thus, Mortensen lost the opportunity to present this corroborating witness in his defense.

4. Jury instructions

The trial court instructed the jury using WPIC 4.01,[1] the pattern instruction on reasonable doubt. CP 142; RP 1410.

Despite Mortensen's testimony that he used force not only to repel Burkett's attack on him but also to come to Michael Nottingham's aid, defense counsel mistakenly did not include defense-of-another language in the self defense instructions he proposed. CP 128; RP 1424. Defense

[1] 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

counsel realized his mistake while the trial court instructed the jury, asking to be heard immediately afterward. RP 1423. Defense counsel asserted the defense theory that Mortensen was not only defending himself but also Michael Nottingham. RP 1424-25.

Defense counsel thus asked to substitute self defense instructions that contained the defense-of-another instruction in WPIC 17.02[2] and asked the trial court to read the correct self defense instruction to the jury. RP 1424-25. The trial court refused, faulting defense counsel for not submitting the correct instruction in the first place. RP 1424-25.

5. Convictions, acquittals, and sentencing

The jury returned guilty verdicts for the two second degree assault counts pertaining to Scott Burkett. CP 172-73; RP 1529-30. With respect to the second assault, the jury also returned a special verdict finding Mortensen was armed with a firearm. CP 174; RP 1530. The jury acquitted Mortensen of all other charges. CP 175, 177, 179, 181; RP 1530-32.

At sentencing, the State conceded that Mortensen's two assault convictions constituted the same criminal conduct under RCW 9.94A.589(1)(a). RP 1542. Thus, Mortensen's offender score was zero. CP 190; RP 1542.

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[2] 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 17.02, at 253 (3d ed. 2008):

The trial court imposed the highest available standard range sentence of nine months along with a 36-month firearm enhancement. CP 190-91; RP 1552-53. The trial court waived all discretionary LFOs except for the $200 filing fee. CP 192; RP 1555. The judgment and sentence erroneously states Mortensen was guilty of second degree assaults based upon a guilty plea, rather than a jury verdict. CP 188.

The trial court determined Mortensen was indigent and permitted Mortensen to seek review at public expense. CP 202-04; RP 1554-56. Mortensen filed a timely notice of appeal. CP 205.

C. ARGUMENT

1. MORTENSEN'S SECOND DEGREE ASSAULT CONVICTIONS VIOLATE DOUBLE JEOPARDY

Mortensen was convicted of two counts of second degree assault against Scott Burkett even though the underlying acts occurred during the same course of conduct. Because recent precedent establishes assault is a course of conduct crime, the two second degree assault convictions violate the prohibition against double jeopardy. One conviction must be dismissed.

Double jeopardy principles preclude being placed twice in jeopardy for the same offense. U.S. CONST. amend. V; CONST. art. I, § 9; State v. Villanueva Gonzalez, 180 Wn.2d 975, 980, 329 P.3d 78 (2014). "The prohibition on double jeopardy generally means that a person cannot . . .

receive multiple punishments for the same offense." Villanueva Gonzalez, 180 Wn.2d at 980.

In Villanueva Gonzalez, the Washington Supreme Court addressed two counts of second degree assault committed by different means against the same person. Id. at 979. The first count alleged assault by strangulation under RCW 9A.36.021(1)(g); the second count alleged assault by recklessly inflicting substantial bodily harm under RCW 9A.36.021(1)(a). Villanueva Gonzalez, 180 Wn.2d at 979. The question before the court was "whether the legislature intended to define assault in such a way that Villanueva-Gonzalez's actions constituted one offense or multiple offenses." Id. at 980.

The court applied a unit of prosecution analysis to determine whether the legislature intended assault to be a course of conduct offense or a separate act offense. Id. at 982-85. The court addressed several out-of-state cases before concluding, based on "the general consensus across the country" "that assault should be treated as a course of conduct crime until and unless the legislature indicates otherwise." Id. at 984. The court reasoned, "Interpreting assault as a course of conduct crime also helps to avoid the risk of a defendant being 'convicted for every punch thrown in a fistfight' that we identified in State v. Tili, 139 Wn.2d 107, 116, 985 P.2d 365 (1999)." Villanueva Gonzalez, 180 Wn.2d at 985.

The court emphasized that there "is no bright-line rule for when multiple assaultive acts constitute one course of conduct." Id. Instead, the "analysis of this issue is highly dependent on the facts," and generally comes down to an assessment of various factors, including the "length of time over which the assaultive acts took place," "[w]hether the assaultive acts took place in the same location," the "defendant's intent or motivation for the different assaultive acts," "[w]hether the acts were uninterrupted or whether there were any intervening acts or events," and "[w]hether there was an opportunity for the defendant to reconsider his or her actions." Id. "[N]o one factor is dispositive, and the ultimate determination should depend on the totality of the circumstances, not a mechanical balancing of the various factors." Id.

The totality of circumstances here demonstrates a continuing course of conduct. The assaultive acts took place in the same location—on the beach across the Columbia from Mortensen's campsite. RP 132, 176, 224, 226, 293, 329-30, 624, 847, 939, 1008, 1123-25. The altercation was very fast, lasting only a few minutes. RP 213, 294, 628, 851, 940.

The various testimony establishes there were no interruptions, intervening acts or enough time for Mortensen to reconsider his actions between the alleged assaultive acts. The testimony is also consistent that

Mortensen's motivation for the assaultive conduct was the same—he was attempting to break loose from Burkett's chokehold.

According to Burkett, Mortensen jumped off the boat, charged at Burkett, and attempted to punch Burkett. RP 178-79. Burkett then grabbed Mortensen and placed him in a chokehold. RP 179-80. Burkett then heard and saw Mortensen had a gun; according to Burkett, Mortensen hit him with the butt of the gun on the nose and the top of his head and then pointed the gun to his forehead. RP 182-84. Only a couple seconds passed between Mortensen's blows. RP 204.

Joshua McDonald's account was similar. He described Mortensen and Nottingham jumping off the boat; Nottingham then ran at him in an aggressive manner. RP 229. As they scuffled, McDonald heard Burkett yell, "be cool," prompting McDonald to look up and see Mortensen had a gun. RP 230-32. McDonald also saw that Burkett already had a broken nose from which he was bleeding. RP 235.

Bianca Lujan also described Mortensen and Nottingham jumping out of the boat, Mortensen attacking Burkett, and Burkett placing Mortensen in a chokehold. RP 132. "And then all of a sudden [Mortensen] just whips out a gun and cocks it and puts it right to [Burkett]'s head." RP 132. When Lujan said she was going to call police, Mortensen then hit Burkett in the nose and got back into his boat. RP 134.

Nottingham's and Mortensen's testimony also shows no interruptions during their altercations with Burkett and McDonald. Nottingham testified he was fighting for 15 to 20 seconds when he heard Mortensen command McDonald to "[g]et off" Nottingham. RP 851. Nottingham saw Mortensen was armed and walked over to Mortensen. RP 854-55. Mortensen described Burkett placing him in a chokehold and felt like he was passing out. RP 1131. Mortensen then struggled to reach the and quickly "smacked [Burkett] on the head with it." 1132-34.

Despite minor differences in testimony, the witnesses' accounts establish that Mortensen's intent or motivation for the different assaultive acts was the same, the acts were not interrupted by intervening acts or events, and there was no opportunity during the beach fighting for Mortensen to stop and reconsider his actions. The assaultive acts took place in the same place, within a short period of time, and against the same person. Under a totality of the circumstances, the facts indicate Mortensen's multiple alleged assaultive acts constituted a single course of conduct.

This conclusion is buttressed by the State's concession at sentencing that the two assault convictions constituted the "same criminal conduct" under RCW 9.94A.589(1)(a). RP 1542. "Same criminal conduct" "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW

9.94A.589(1)(a). By conceding Mortensen's acts constituted the same criminal conduct. the State should not now be permitted to dispute that Mortensen's alleged assaultive acts were not the same course of conduct.

Based on the record and the factors identified by the Washington Supreme Court in Villanueva Gonzalez, Mortensen's alleged assaultive acts against Burkett constituted a single course of conduct. Mortensen's two second degree assault convictions therefore violate the constitutional prohibition against double jeopardy. One of the convictions must be dismissed.

2. THE TRIAL COURT DEPRIVED MORTENSEN OF A FULL AND FAIR OPPORTUNITY TO PRESENT HIS SELF DEFENSE THEORY WHEN IT REFUSED TO INSTRUCT THE JURY THAT MORTENSEN WAS ENTITLED TO USE REASONABLE FORCE IN THE AID OF ANOTHER

Defense counsel asked to be heard immediately after the trial court instructed the jury, prior to the State's closing argument. RP 1423. Counsel realized that he had mistakenly omitted language from the self defense instructions that the defendant's use of force was lawful when used by someone lawfully aiding a person whom he reasonably believed was about to be injured. RP 1424; CP 128, 153. Defense counsel proposed "we could just, you know, add a couple words to fix it." RP 1424. The trial court refused. RP 1424-25. Because the aiding-another-who-is-about-to-be-

injured instruction is a correct statement of the law and because it was necessary for Mortensen to present his self defense theory to the jury, the trial court's refusal to provide this instruction was reversible error.

a. The trial court erred by refusing to correctly instruct the jury on the law of self defense

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). "'Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory.'" Id. (quoting State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997)). "'Failure to give such instructions is prejudicial error.'" Id. (quoting State v. Riley, 137 Wn.2d 904, 908 n.1, 976 P.2d 624 (1999)).

"Jury instructions on self-defense must more than adequately convey the law." State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). They "must make the relevant legal standard manifestly apparent to the average juror." Id. The instructions the trial court gave failed to make the relevant standard on lawfully coming to the aid of another manifestly clear.

Although it came late, defense counsel proposed a jury instruction containing a correct statement of the law on defense of another. RP 1424. Per the applicable pattern instruction, it is lawful to use force toward the

person of another "when [used] . . . [by someone lawfully aiding a person who [he] . . . reasonably believes is about to be injured] in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.]" 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 17.02, at 253 (3d ed. 2008); see also RCW 9A.16.020(3) ("The use, attempt, or offer to use force upon or toward the person of another is not unlawful . . . Whenever used by a party about to be injured, or by another lawfully aiding him or her . . . ." (emphasis added)).

Mortensen's proposed defense-of-another instruction was amply supported by the evidence at trial. Michael Nottingham, who is five feet, six inches tall and weighs 160 pounds, testified he and Mortensen crossed over the river in Mortensen's boat and hopped out on the other side. RP 847-48. Nottingham heard a noise behind him and then immediately got "clipped" with something that caused his eyebrow to split open. RP 848. Nottingham then described becoming involved in a physical altercation with a much bigger man—Joshua McDonald, who is six feet, five inches tall and weighs 240 pounds, RP 259—who held him in a headlock. RP 849-50.

Mortensen testified he saw Nottingham disappear off the front of the boat and then "heard a tussle and saw kind of a sand wave in [the] bow lights go across the front of the boat." RP 1125-26. Mortensen said it "looked like somebody was -- it looked like Sasquatch was dragging [Nottingham]

away," "like something had a hold of him and was dragging him." RP 1126. Mortensen jumped off the boat and ran after Nottingham, but then heard movement behind him. RP 1126-27. Mortensen hit what felt like Scott Burkett's shoulder, knocking Burkett down, and then "turned around and attempted to go back up to" Nottingham. RP 1129, 1186. As Mortensen attempted to come to Nottingham's aid, Burkett pulled Mortensen backwards into a chokehold. RP 1129-30, 1186. Mortensen broke free of the chokehold by hitting Burkett in the head with the butt of the gun. RP 1132-34. Nottingham testified that about 15 to 20 seconds into the altercation, he heard Mortensen command McDonald to "get off" Nottingham. RP 851; see also RP 231 (McDonald's testimony that he heard Burkett yell, "be cool," and then saw Mortensen had a gun).

Mortensen's and Nottingham's testimony constituted substantial evidence to support Mortensen's defense that he acted not only to defend himself but also to come to Nottingham's aid. Indeed, Mortensen stated his focus from the moment he jumped off the boat was rescuing Nottingham from a much larger man he referred to as a Sasquatch. Given the size disparity between Nottingham and McDonald, there was also substantial evidence to support Mortensen's reasonable belief that Nottingham was about to be injured. Because Mortensen presented significant evidence to support his defense-of-another theory, Mortensen was entitled to an

instruction that informed the jury he was lawfully permitted to use reasonable force to aid another whom he believed was about to be injured.

The trial court refused to give the correct defense-of-another instruction, despite defense counsel's acknowledgment that he "left out a critical prong in the instructions." RP 1424-25. The court stated, "I'm not adding anything to these," and "I'm not modifying," even though Mortensen was legally entitled to a correct set of self defense instructions. The trial court based its refusal to correctly instruct the jury on the fact that defense counsel drafted the instructions, that the trial court had already read the instructions to the jury, and that "We've spent a lot of time on this." RP 1424-25. These reasons do not justify the trial court's refusal to "make the relevant legal standard manifestly apparent to the average juror." Walden, 131 Wn.2d at 473.

Mortensen had presented substantial evidence to support an instruction regarding the defense of another. Mortensen's attorney readily admitted he mistakenly omitted the defense-of-another language from the self defense instructions he proposed. It would have taken about five minutes to put together a corrected set of self defense instructions and read those corrected instructions to the jury. The trial court's apparent desire to expedite the trial does not and cannot overcome Mortensen's constitutional right to present his chosen defense to a jury correctly instructed on the law.

By unreasonably refusing to correctly instruct the jury on the law of self defense, the trial court erred. This error requires reversal and a new trial at which Mortensen's jury is properly instructed on the law of self defense.

b. To the extent defense counsel's mistake waived the correct self defense instruction, defense counsel rendered ineffective assistance of counsel

In the event the trial court properly refused to give the defense-of-another instruction because defense counsel untimely proposed it, defense counsel rendered ineffective assistance of counsel.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. To establish a claim for ineffective assistance, counsel's performance must have been deficient and the deficient performance must have resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness." State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). If counsel's conduct reveals a legitimate strategy or trial tactic, it cannot serve as a basis for an ineffective assistance of counsel claim. Id. at 90. "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome [of trial] would have differed." Id.

Defense counsel's failure to timely propose self defense instructions that contained the defense-of-another language was the reason the trial court refused to properly instruct the jury on self defense. If the trial court was justified in refusing to give the defense-of-another instruction based on defense counsel's tardy proposal, defense counsel was ineffective.

"Representation of a criminal defendant entails certain basic duties." Strickland, 466 U.S. at 688. Defense counsel must employ "such skill and knowledge as will render the trial a reliable adversarial testing process." Id. Failing to meet a filing deadline constitutes deficient representation. State v. Lopez, 107 Wn. App. 270, 276, 27 P.3d 237 (2001) (citing State v. Snyder, 860 P.2d 351, 359 (Utah Ct. App. 1993)). In the same vein, failing to timely propose certain jury instructions is deficient performance when it results in the trial court's refusal to give the instructions. Indeed, no objectively reasonable attorney would mistakenly omit certain language from jury instructions after the omission was too late to correct, thereby depriving his or her client of the opportunity to fully present a self defense claim. Nor could a legitimate strategy explain mistakenly omitting essential language from a jury instruction. Here, defense counsel readily admitted he had no strategy, acknowledging he had "only [him]self to blame here. It should have mentioned, also, somebody lawful[ly] aiding a person who he reasonably believes is about to be injured." RP 1424. By failing to timely

propose a correct version the self defense instructions, defense counsel's performance fell below an objectively reasonable standard.

c. The omission of the defense-of-another instruction prejudiced Mortensen's ability to fully and fairly present his self defense claim

The trial court's refusal to instruct the jury on the lawful defense of another, whether or not based on counsel's deficient performance, prejudiced Mortensen. Mortensen's theory was that he was entitled to use reasonable force to repel Burkett's attack against his person and also to repel McDonald's attack against Nottingham. Indeed, defense counsel argued during closing argument that "Whatever [Mortensen] said, whatever he did at that moment was to protect himself, get those guys to stop, and to get that giant guy off his little friend, Michael Nottingham. That's what his goal was." RP 1475. Because the trial court did not give the defense-of-another instruction, however, the jury was left to conclude that Mortensen could use force only when he believed that he himself was "about to be injured in preventing or attempting to prevent an offense" against his person. CP 153. Based on the instructions, the jury would have necessarily disregarded Mortensen's actions to the extent they were intended to come to the aid of Nottingham. The lack of a defense-of-another instruction deprived Mortensen of the full effect of his self defense theory, given that the instructions failed to make the law of self defense—including that it was

lawful to aid another who is about to be injured—manifestly clear to the jury.

In response, the State might argue that the instructions still permitted Mortensen to argue his theory of the case and that Mortensen actually did so. But the law requires more. Merely allowing Mortensen to argue his theory still left him with the burden of overcoming the inconsistency between the instruction as written and his theory that he was acting to protect not only himself but also Nottingham. Cf. Irons, 101 Wn. App. at 559 (holding it was prejudicial not to give a multiple assailants instruction because it required the defense to overcome inconsistency between the instructions as written and the defense theory). "'The defense attorney is only required to argue to the jury that the facts fit the law; the attorney should not have to convince the jury what the law is.'" State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996) (quoting State v. Acosta, 101 Wn.2d, 612, 622, 683 P.2d 1069 (1984)), abrogated in part on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). The jury was expressly instructed to disregard "any remark, statement, or argument that is not supported by the evidence or the law in [the court's] instructions." CP 137. Therefore, even though Mortensen might have been able to argue his defense-of-another theory, the jury was compelled to disregard such arguments. This prejudiced Mortensen's chosen defense.

The jury instructions given to Mortensen's jury precluded jurors from considering Mortensen's actions to rescue Nottingham from harm in determining whether Mortensen's use of force was reasonable. The outcome of Mortensen's trial would have differed had the jury been correctly instructed that it may consider Mortensen's reasonable use of force to repel not only his own attacker but also Nottingham's. The instructional error was prejudicial. Mortensen asks this court to reverse and remand for a new trial at which the jury is properly instructed on self defense.

3. THE EXCLUSION OF AISHA NOTTINGHAM'S TESTIMONY THAT VANCOUVER POLICE OFFICERS THREATENED HER AND MORTENSEN VIOLATED MORTENSEN'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

Initially, on the basis of hearsay, the trial court disallowed Aisha Nottingham, Mortensen's girlfriend, to testify that officers threatened to arrest them and call child protective services if they learned Mortensen had crossed the river to where Burkett, McDonald, and Lujan were. RP 950, 953. Later, during Mortensen's testimony, based on the State's concession, the trial court reversed its previous ruling and permitted Mortensen to describe the officers' threats. RP 1076-77, 1158-59, 1200-03. But, when defense counsel attempted to recall Aisha Nottingham to corroborate Mortensen's testimony, the trial court denied the request because of its ER 615 witness exclusion order, noting that Aisha Nottingham had been present

in the courtroom. RP 1240-42. The trial court erred in invoking an evidence rule to trump Mortensen's constitutional right to present a witness in his defense. Because this error negatively affected the jury's assessment of Mortensen's credibility, it requires reversal.

a. Violation of an ER 615 ruling excluding witnesses from the courtroom does not warrant the drastic remedy of denying the accused his constitutional right to present a witness in his defense

The right to call witnesses is the very essence of due process in a criminal trial. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, L. Ed. 2d 297 (1973). Indeed, a defendant's right to present witnesses is "in plain terms the right to present a defense." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

It is generally within the court's discretion to exclude witnesses from the courtroom until after they have testified. ER 615; State v. Dixon, 37 Wn. App. 867, 877, 684 P.2d 725 (1984). Mortensen finds no Washington case addressing the potential tension between ER 615 and the defendant's constitutional right to present a defense. However, federal courts have generally held that a defense witness may not be excluded solely for violating a ruling excluding witnesses. Under these cases, an evidence rule cannot trounce the constitutional right to call a witness.

In United States v. Gibson, the Sixth Circuit stated that a witness disobeying an exclusion order may be proceeded against for contempt, "'and his testimony is open to comment to the jury by reason of his conduct.'" but "'he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely.'" 675 F.2d 825, 835-36 (6th Cir. 1982) (quoting Holder v. United States, 150 U.S. 91, 92, 14 S. Ct. 10, 37 L. Ed. 1010 (1893)); accord Calloway v. Blackburn, 612 F.2d 201, 204 (5th Cir. 1980) ("[I]t is generally true that a witness should not be disqualified for [violating witness sequestration order] alone.").

The remedy of complete exclusion of a witness is justified only where there is a knowing and intelligent waiver or "'consent, procurement, or knowledge on the part of defendant or his counsel.'" Calloway, 612 F.2d at 204 (quoting Braswell v. Wainwright, 463 F.2d 1148 (5th Cir. 1972)); Gibson, 675 F.2d at 836 (collecting cases); United States v. Torbert, 496 F.2d 154, 158 (9th Cir. 1974) ("[I]t is ordinarily an abuse of discretion to disqualify a witness unless the defendant or his counsel have somehow cooperated in the violation of the order.").

Washington courts and commentators appear to apply the same principles when a State's witness violates ER 615. In Dixon, for instance, the trial court permitted the State's witness to testify despite violating the ER 615 exclusion order. 37 Wn. App. at 876. On appeal, the court held there

was no abuse of discretion because the prosecutor claimed he had not anticipated the witness would be called to testify and because there was no bad faith. Id. at 877; see also State v. Bergen, 13 Wn. App. 974, 977-78, 538 P.2d 533 (1975) (permitting two State rebuttal witnesses to testify despite hearing defendant's testimony because there was no evidence of bad faith). "Refusal to permit the offending witness to testify is regarded as a drastic remedy, but one which may be invoked if the witness violates the court's order with the connivance or knowledge of a party or counsel." 5A WASH. PRACTICE: EVIDENCE LAW & PRACTICE § 615.5, at 628-29 (5th ed. 2007).

Thus, more than an innocent violation of ER 615 based on mistake is required before the defendant may be prevented from presenting a witness in support of his case. The extreme sanction of excluding a witness should be limited to situations of demonstrated bad faith or collusion.

The trial court's refusal to permit the defense to recall Aisha Nottingham was manifestly unreasonable because there was no evidence of bad faith or collusion by Mortensen or his attorney. The need to recall Aisha Nottingham to the witness stand did not become apparent until after the trial court reversed its previous hearsay ruling and permitted Mortensen to testify about officers' threats to take him to jail or call child protective services. RP 1076-77. As defense counsel explained, "Ms. Nottingham was in here for a little while yesterday, because I had assumed that the matter was over. I

didn't expect to be recalling her . . . . and this now leaves the State open to argue, well, nobody else heard" the police threats. RP 1240-41. There was no collusion or bad faith on the part of defense counsel, just a mistake.

Moreover, the trial court's initial ruling prohibiting Aisha Nottingham's testimony about the officers' threats was erroneous. Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). The defense offered Aisha Nottingham's testimony about the threats not for their truth, but for their effect on her state of mind. RP 952-53. The defense theory was that the officers' threats prompted Mortensen, the Nottinghams, and others to concoct a story about being attacked on their side of the river by Lujan, McDonald, and Burkett. RP 1158, 1203-05. The trial court also excluded Aisha Nottingham's testimony because she could not identify which officers made the threats: "She didn't know who the officers were. There was no way for the State to rebut that kind of testimony." RP 953, 1241. This reasoning is also faulty because there were only four officers who could possibly have made the threats. RP 418, 1227. The State could thus have attempted to rebut Aisha Nottingham's testimony by calling one or more of the officers to testify they never made or heard any such threats, and, in fact, the State actually did so. RP 1229-31. Thus, the trial court lacked any basis to exclude Aisha Nottingham's testimony.

b. Alternatively, defense counsel rendered ineffective assistance by failing to ensure Aisha Nottingham was kept out of the courtroom

The trial court stated that defense counsel was to blame for Aisha Nottingham's exclusion:

> we've had a situation where it's much like . . . an invited error. I anticipated that very problem coming up with Ms. Nottingham sitting in the courtroom listening to all this testimony. I specifically asked you, Is there a problem with that witness being in the courtroom. You specifically said, No, I don't plan to re-call her.

RP 1241-42. Earlier in the day, the court had pointed out witnesses in the court room, stating, "If they're going to be re-called for any reason, they can't be in here," to which defense counsel responded, "I do not expect to re-call Aisha, Your Honor." RP 1080. Because defense counsel should have anticipated the need to recall Aisha Nottingham to corroborate Mortensen's testimony and thus also ensured Aisha Nottingham remained outside of the courtroom at all times, counsel rendered ineffective assistance.

No reasonable attorney would forgo the possibility of calling a witness who could corroborate his or her client's testimony. No trial strategy could explain failing to instruct a witness who needs to be recalled to remain outside the courtroom. This is especially true where the court has reversed its previous ruling, would likely allow the witness to be recalled, and expressly inquired about whether the witness in question should be excluded from the courtroom. By failing to ensure Aisha Nottingham stayed out of

the courtroom during Mortensen's testimony about the police officer threats, defense counsel's performance fell below an objective standard of reasonableness.

c. The exclusion of Aisha Nottingham's testimony was prejudicial

An error affecting the right to present witnesses in one's defense is an error of constitutional magnitude and will not be considered harmless unless the State can show beyond a reasonable doubt that the jury would have reached the same result without the error. State v. Maupin, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996). The State cannot make this showing.

Aisha Nottingham was unable to testify that she also heard police threaten to take Mortensen to jail and to call child protective services, which deprived Mortensen of a chance to present evidence corroborating his version of events. Thus, jurors heard only Mortensen testify that the threats were made; and they also heard an officer deny these threats. RP 1157-58, 1200-03, 1229-31, 1235. Because this case came down to a credibility contest between competing versions of events, the jury was left to conclude Mortensen was overreaching or lying because no other witness substantiated that the officers made the threats. This prejudiced the outcome of trial.

Furthermore, defense counsel, referring to Aisha Nottingham's potential testimony about the threats, stated, "This is the thing that I

mentioned in my opening statement. This is why they kind of cemented this story." RP 951. Although defense counsel mentioned this in his opening, he was unable to follow through with this theory during trial given the preclusion of Aisha Nottingham's testimony on this subject.

The Washington Supreme Court has recognized that counsel's failure to follow up on promises to elicit certain evidence during opening statement is "quite serious." State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). In Greiff, defense counsel told jurors in opening they would hear a police officer's testimony that the victim repeatedly denied the occurrence of any sexual assault. Id. at 916-17. In making this representation, counsel relied on the officer's testimony from Greiff's first trial. Id. at 917. Then the officer testified her never asked the victim whether she had been raped, explaining he had confused two different cases with one another. Id. at 917-18.

The court concluded that defense counsel's inability to follow through on his representation during opening statement was "quite serious" because of the damage it causes to defense counsel's credibility. Id. at 921. The court did not find prejudice, however, because "it would be 'obvious' to the jury that the reason [the officer] did not testify the way Greiff's counsel said he would is because [the officer] had made a mistake in his earlier testimony." Id. at 922. In addition, the court noted the trial court "took

appropriate curative steps to lessen any negative impact the opening statement may have had had on Greiff's counsel's credibility," including admitting the officer's testimony from the previous trial and instructing the jury to use it to assess the officer's credibility. Id. The court also rejected Greiff's ineffective assistance of counsel claim because it "was not based on the incompetence of his attorney" but on the fact that the State did not disclose the change in the officer's testimony in advance of defense counsel's opening statement. Id. at 925.

Here, unlike Greiff, defense counsel promised to present certain evidence of the threats and then failed to present the corroborative testimony of Aisha Nottingham. Unlike in Greiff, where defense counsel had a good faith basis for representing what the officer's testimony would be, defense counsel failed to ensure he had the ability to present the evidence in question. Defense counsel's failure to ensure Aisha Nottingham was excluded from the courtroom was based on his misunderstanding of the law in significant contrast to Greiff. Also, unlike Greiff, the trial court did not and could not undertake curative steps to lessen the prejudice.

Defense counsel's and Mortensen's credibility was wounded beyond cure by not being able to corroborate Mortensen's testimony regarding police officers' threats. This error requires reversal and a new trial.

4. WASHINGTON'S PATTERN INSTRUCTION ON REASONABLE DOUBT DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED

At Mortensen's trial, the court gave the standard reasonable doubt instruction, WPIC 4.01, which reads, in part:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 142 (emphasis added); RP 1410.

This instruction is constitutionally defective for two related reasons. First, it tells jurors they must be able to articulate a reason for having a reasonable doubt. This engrafts an additional requirement onto reasonable doubt, making it more difficult for jurors to acquit and easier for the prosecution to obtain convictions. Second, telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence and is substantively identical to the fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases.

In order for jury instructions to be sufficient, they must be "readily understood and not misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). "The rules of sentence structure and

punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words." State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), rev'd on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). In examining how an average juror would interpret an instruction, appellate courts look to the ordinary meaning of words and rules of grammar.[3]

With these principles in mind, the flaw in WPIC 4.01 reveals itself with little difficulty. Having a reasonable doubt is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to return a "not guilty" verdict. Examination of the meaning of the words "reasonable" and "a reason" shows this to be true.

"Reasonable" means "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment." WEBSTER'S THIRD NEW INT'L DICTIONARY 1892 (1993). For a doubt to be reasonable, it must be rational, logically derived, and have no conflict with reason. See Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L.

[3] See, e.g., Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (looking to dictionary definition of word "presume" to determine how jury may have interpreted the instruction); State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (grammatical reading of self defense instruction permitted the jury to find actual imminent harm was necessary, making it possible the jury applied the erroneous standard), abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009).

Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965)).

Thus, an instruction defining reasonable doubt as "a doubt based on reason" would be proper. But WPIC 4.01 does not do that. Instead, WPIC 4.01 requires "a reason" for the doubt, which is different from a doubt based on reason. "A reason" in the context of WPIC 4.01 means "an expression or statement offered as an explanation of a belief or assertion or as a justification." WEBSTER'S, supra, at 1891. In contrast to definitions employing the term "reason" in a manner that refers to a doubt based on reason or logic, WPIC 4.01's use of the words "a reason" indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a doubt based on reason; it requires a doubt that is articulable. This is unconstitutional.

Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires the defense or the jurors to supply a reason to doubt, shifting the burden and undermining the presumption of innocence. The presumption of innocence "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to

achieve." State v. Bennett, 161 Wn.2d 303, 316, 165 P.3d 1241 (2007). The WPIC 4.01 language does just that in directing jurors they must have a reason to acquit rather than a doubt based on reason.

In the context of prosecutorial misconduct, courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. A fill-in-the-blank argument "improperly implies that the jury must be able to articulate its reasonable doubt" and "subtly shifts the burden to the defense." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Such arguments "misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence," because "a jury need do nothing to find a defendant not guilty." Id. at 759.

But the improper fill-in-the-blank arguments did not originate in a vacuum—they sprang directly from WPIC 4.01's language. In State v. Anderson, for example, the prosecutor recited WPIC 4.01 before making the fill-in-the-blank argument: "A reasonable doubt is one for which a reason exists. That means, in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." 153 Wn. App. 417, 424, 220 P.3d 1273 (2009). The same occurred in State v. Johnson, where the prosecutor told jurors: "What [WPIC 4.01] says is 'a doubt for which a reason exists.' In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my

reason is . . . .' To be able to find a reason to doubt, you have to fill in the blank; that's your job." 158 Wn. App. 677, 682, 243 P.3d 936 (2010).

If telling jurors they must articulate a reason for their doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the same undermining to occur through a jury instruction. The misconduct cases make clear that WPIC 4.01 is the true culprit. Its doubt "for which a reason exists" language provides a natural and seemingly irresistible basis to argue that jurors must give a reason for their reasonable doubt. If lawyers mistakenly believe WPIC 4.01 requires articulation of doubt, then how can average jurors be expected to avoid the same pitfall?

No appellate court in recent times has directly grappled with the challenged language. The Bennett court directed trial courts to give WPIC 4.01 at least "until a better instruction is approved." 161 Wn.2d at 318. The Emery court contrasted the "proper description" of reasonable doubt as a "doubt for which a reason exists" with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. 174 Wn.2d at 759.

In State v. Kalebaugh, the court similarly contrasted "the correct jury instruction that a 'reasonable doubt' is a doubt for which a reason exists" with an improper instruction that "a reasonable doubt is 'a doubt

for which a reason can be given.'" 183 Wn.2d 578, 584, 355 P.3d 253 (2015). The court concluded the trial court's erroneous instruction—"a doubt for which a reason can be given"—was harmless, accepting Kalebaugh's concession at oral argument "that the judge's remark 'could live quite comfortably' with the final instructions given here." Id. at 585.

None of the appellants in Bennett, Emery, or Kalebaugh argued the language requiring "a reason" in WPIC 4.01 misstates the reasonable doubt standard. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because WPIC 4.01 was not challenged on appeal in those cases, the analysis in each flows from the unquestioned premise that WPIC 4.01 is correct. As such, their approval of WPIC 4.01's language does not control.

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the right to a jury trial. Id. at 279-80. Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id.

at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82. Though defense counsel did not object to the instruction, structural errors qualify as manifest constitutional errors under RAP 2.5(a)(3). State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012).

WPIC 4.01's language requires more than just a reasonable doubt to acquit; it also requires an articulable doubt. This undermines the presumption of innocence, shifts the burden of proof, and misinstructs jurors on the meaning of reasonable doubt. Instructing jurors with WPIC 4.01 is structural error and requires reversal of Mortensen's convictions.

5. THE $200 CRIMINAL FILING FEE IS NOT MANDATORY AND THE TRIAL COURT SHOULD HAVE INQUIRED INTO MORTENSEN'S ABILITY TO PAY BEFORE IMPOSING IT

The trial court imposed a $200 criminal filing fee. CP 192. Because this fee is discretionary, not mandatory, the trial court erred in imposing it without first conducting an adequate inquiry into Mortensen's financial conditions and ability to pay.

RCW 9.94A.760 permits trial courts to order LFOs as part of a criminal sentence. However, RCW 10.01.160(3) prohibits imposing LFOs unless "the defendant is or will be able to pay them." To determine whether to impose LFOs, courts "shall take account of the financial resources of the

defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

The Washington Supreme Court held RCW 10.01.160(3) requires trail courts to first consider an individual's current and future ability to pay before imposing discretionary LFOs. State v. Blazina, 182 Wn.2d 827, 837-39, 344 P.3d 680 (2015). The record must reflect this inquiry, which should include at minimum the length of incarceration and other debts. Id. at 838.

This court has indicated that the $200 criminal filing fee is mandatory, not discretionary. State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). Mortensen disagrees. The Lundy court provided no rationale or analysis of the statutory language supporting its conclusion that the fee is mandatory. See id.; see also State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016) (Division Three's mere citation to Lundy for proposition that filing fee must be imposed regardless of indigency without statutory analysis). Lundy was wrongly decided and the pernicious effects of LFOs recognized in Blazina demonstrate the harmfulness of imposing discretionary LFOs without an adequate ability-to-pay inquiry. This court should therefore overrule Lundy's determination that the filing fee is a mandatory LFO. See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (stare decisis "requires a clear showing that an established rule is incorrect and harmful before it is abandoned").

The language of RCW 36.18.020(2)(h), which provides authority to impose a filing fee, differs from other statutes authorizing mandatory fees. For instance, the victim penalty assessment statute provides, "When any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035 (emphasis added). This statute is unambiguous in its mandate that the assessment "shall be imposed." The same is true of the DNA collection fee statutes, which provides, "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." RCW 43.43.7541 (emphasis added).

RCW 36.18.020(2)(h) is not the same. It provides that, upon conviction, "an adult defendant in a criminal case shall be liable for a fee of two hundred dollars." (Emphasis added.) In contrast to the DNA collection and victim penalty assessment statutes—both of which demonstrate that the legislature knows how to unambiguously mandate the imposition of a legal financial obligation—RCW 36.18.020(2)(h) does not mandate the imposition or inclusion of a $200 criminal filing fee.

Nowhere in RCW 36.18.020(2)(h)'s language is the requirement that trial courts must impose the $200 filing fee upon conviction. Although RCW 36.18.020(2) states that "[c]lerks of superior courts shall collect" the fee, no language indicates the fee cannot be waived by a judge. Many

superior courts never impose the $200 filing fee. The $200 filing fee is a discretionary LFO, not a mandatory one.

Moreover, being liable for a fee and being required to pay a fee are different things. "Liability" for a fee does not make the fee mandatory given that the term "liable" encompasses a broad range of possibilities, from making a person "obligated" in law to pay to imposing a "future possible or probable happening that may not occur." BLACK'S LAW DICTIONARY 915 (6th ed. 1990). Thus, "liable" can mean a situation that *might* give rise to legal liability. At best, the statutory language is ambiguous as to whether it is mandatory. Under the rule of lenity, the statutory language must be interpreted in Mortensen's favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

This court should not adhere to Lundy, which contained no reasoning to support its conclusion that the criminal filing fee is mandatory. Our supreme court recently appeared skeptical that the $200 filing fee was mandatory, noting it has only "been treated as mandatory by the Court of Appeals." State v. Duncan, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016). That the court would identify those fees designated as mandatory by the legislature on the one hand, and then separately identify the criminal filing fee as one that has merely been *treated* as mandatory on the other, shows the supreme court sees a distinction. This court should not follow Lundy,

provide meaningful consideration of RCW 36.18.020(2)(h)'s language, and hold that the criminal filing fee is a discretionary LFO.

In response, the State might argue that this court should decline to consider this argument because Mortensen did not specifically object to it at sentencing. However, RAP 2.5(a) provides that this court "may refuse to review any claim of error which was not raised in the trial court"—this court has ample discretion. And RAP 1.2 expresses a clear preference to liberally interpret the rules of appellate procedure "to promote justice and facilitate the decision of cases on the merits." In light of Blazina's call to address a "broken LFO systems," 182 Wn.2d at 835, and the Washington Supreme Court's recent skepticism in Duncan that the filing fee is mandatory, this court should address Mortensen's claim and decide it on the merits.

Mortensen asks this court to hold the criminal filing fee is a discretionary LFO and remand for resentencing so that the $200 fee may be stricken from the judgment and sentence.

6. THE JUDGMENT AND SENTENCE SHOULD BE AMENDED TO REFLECT THAT MORTENSEN WAS CONVICTED BY JURY VERDICT

A scrivener's error is synonymous with a "clerical mistake." In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2003). "A clerical mistake is one that when amended would correctly convey the intention of the court . . . ." State v. Priest, 100 Wn. App. 451, 455, 997 P.2d

452 (2000). The remedy for a scrivener's error is remand for correction of the error. Mayer, 128 Wn. App. at 701-02.

Mortensen's judgment and sentence states, "The defendant is guilty of the following offenses, based upon . . . guilty plea." CP 188. This is incorrect: Mortensen was convicted by jury verdict. RP 1528-32. This court should remand for correction of this error.

7. APPELLATE COSTS SHOULD BE DENIED

Appellate courts indisputably have discretion to deny appellate costs. RCW 10.73.160(1); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034, ___ P.3d ___ (2016). This court should exercise discretion and deny appellate costs.

The trial court determined Mortensen was indigent and entitled to appellate representation and the creation of the appellate record at public expense. CP 202-04. Based on this determination, Mortensen is presumed indigent throughout this review. RAP 15.2(f). The Sinclair court stated, "We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve . . . . We therefore presume Sinclair remains indigent." 192 Wn. App. at 393. Because the trial court likewise found Mortensen indigent, this court should presume he remains so and deny any request by the State for appellate costs.

With the exception of the $200 criminal filing fee discussed above, the trial court also waived all discretionary legal financial obligations, including court costs and fees for court-appointed counsel. CP 192. To impose thousands of dollars on appeal for court costs and fees for court-appointed counsel would directly affront the trial court's waiver of discretionary LFOs. Based on the record, this court should exercise discretion and deny any request by the State for costs on appeal.

D. CONCLUSION

One of Mortensen's second degree assault convictions must be dismissed because it violates the prohibition against double jeopardy. Because Mortensen was deprived of a full opportunity to present a defense and was otherwise denied a fair trial, he asks that this court reverse and remand for a new a fair trial.

DATED this 12th day of September, 2016.

Respectfully submitted,

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